IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 3790 of 1991

Chintaman Eknath Salunke since

deceased by his legal heirs ... Petitioners

1. Smt Bhimabai Chintaman Salunkhe

& two others.

vs

Sou.Shashikala Vithal Magar .. Respondent

Mr.Jagdish Reddy for Petitioners

Mr.R.M.Pethe for Mr.B.R.Phatak for Respondent

CORAM : D.G.KARNIK, J

DATE: 13TH JULY, 2004.

P.C.

1. By this petition, the petitioners challenges the judgment and order dated 22nd March, 1991 passed by the learned 8th Additional District Judge, Pune in Civil Appeal No.794 of 1986 dismissing the appeal and confirming the decree for possession passed against the petitioners-tenants.

2. Chintaman Eknath Salunkhe (since deceased) was a tenant in respect of two rooms in C.T.S. No.947, Raviwar Peth, Pune (hereinafter referred to as the suit premises). The suit property originally

belonged to one Dattatraya Tukaram Pandhare and by a registered sale deed dated 9th June, 1981 the respondent purchased it. According to the respondent, the petitioner was in arrears of rent since 1st January, 1972. After the purchase, by a notice to quit dated 20th September, 1981 the respondent demanded possession and also demanded arrears of rent from the tenant. Chintaman died after issuance of the notice without payment of rent. The respondent therefore filed a suit bearing Small Causes Court Suit No. 2420 of 1981 against the heirs of Chintaman for possession on the ground of default and also on the ground that the respondent required the suit premises reasonably and bonafide for his own use and occupation. The trial court held that Chintaman had not paid the rent from 1st January, 1972 and was a defaulter. The trial court also held that the respondent required the suit premises reasonably and bonafide for his own use and occupation but held that greater hardship would be caused to the tenant by passing a decree than to the respondent by refusing to pass a decree. The trial court, therefore, passed a decree for possession only on the ground of default. By the judgment and order dated 22nd March, 1991 the appellate court dismissed the appeal. That judgment is challenged in this writ petition.

3. The trial court has held that the petitioner had not paid the rent from 1st January, 1972 and therefore, on the date of notice i.e. 20th September, 1981 he was in arrears of rent for more than six months which he failed and neglected to pay despite notice. The petitioner was a defaulter and the respondent was entitled to a decree for possession under section 12 (3) (a) of the Bombay Rent Act. The trial court however, overlooked the fact that the respondent had purchased the property only by a sale deed dated 9th June, 1981. The original sale deed was not produced in the court and there was nothing on record to show that the right of recovery of arrears of rent from 9th June, 1981 was transferred to the respondent. Section 109 of the Transfer of Property Act states that where the lessor transfers the property leased the transferee in the absence of the contract to the contrary, would possess all the rights of the lessor. However, the proviso to section 109 states that the transferee shall not be entitled to arrears of rent due before the date of transfer. Therefore, the respondent in the absence of contract to the contrary, was not entitled to recover the rent for a period earlier than 9th June, 1981. On the date of the suit notice i.e. 20th September, 1981, the tenant was not in arrears of rent for more than

three months as the respondent was entitled to recover rent only from 9th June, 1981. The case, therefore, could not fall under clause (a) of subsection (3) of section 12 of the Bombay Rent Act. No contention is raised before the Courts below that the respondent was entitled to a decree also under clause (b) or in the alternative under clause (b) of subsection 3 of section 12 of the Bombay Rent Act. In the circumstances, the decree passed under sub-clause (a) of sub-section 3 of section 12 of the Bombay Rent cannot be sustained.

4. Learned counsel for the petitioner further submits that section 109 of the Transfer of Property Act is subject to the contract to the contrary and therefore he submits that even a proviso to section 109 must also be held to be subject to the contract to the contrary. Learned counsel submits that there was a contract to the contrary between the parties and Mr. Pandhare the original owner had assigned and transferred the right to recover the arrears of rent to the respondent. In support, learned counsel relies upon a letter of attornment, copy of which was produced at Exhibit 32 allegedly written by the original owner Dattatraya Pandhare to Chintaman. The copy purportingly bears the thumb impression of Chintaman in token of the receipt of the original.

In the said letter of attornment, it is mentioned that the tenant should pay arrears of rent from 1st January, 1972 to the transferee. Chintaman having died the suit was filed against the legal representatives, who denied that the thumb impression on the letter of attornment to be of Chintaman. They deposed that Chintaman was able to sign and the thumb impression was not his. There was one more document on record which purportedly bears the signature of Chintaman, but, the postal acknowledgment of the quit notice purportedly bears the thumb impression of Chintaman. On the basis that Chintaman had put his thumb impression on the postal acknowledgment, the trial court held that Chintaman was not able to sign and must only be making thumb mark instead of his signature. The trial Court however, no where considered whether the thumb impression on the copy of the letter of attornment Exhibit 32 was legally proved to be that of Chintaman. No doubt, the respondent has stated in his deposition that the thumb impression was made in his presence but there is nothing on record to show that the original letter was delivered to Chintman by the previous owner in his presence and that the thumb impression was made in his presence by Chintaman. The thumb impression was not attested by the respondent but was attested by somebody else.

The attesting witness was not examined. No finger print expert was examined to prove that the thumb impression was of Chintaman. Needless to say that the thumb impression cannot be proved by comparison by an ordinary person having no knowledge of examining the thumb impressions Nobody has stated that the thumb impression on the copy of the letter of attornment was identical with the thumb impression on the postal acknowledgment of the notice. Thus, the thumb impression was not proved. It therefore cannot be held that the letter of attornment Exhibit 32 was an agreement to the contrary within the meaning of section 109 of the Transfer of Property Act.

5. Assuming that the thumb impression on Exhibit 32 is properly proved by a mere statement of the respondent that the thumb impression was made in his presence, it still cannot be said that the respondent had proved the existence of an agreement to the contrary within the meaning of section 109 of the Transfer of Property Act. Admittedly, the letter of attornment Exhibit 32 is not an agreement between the original owner and the transferee viz. the respondent. What section 109 of the Transfer of Property Act contemplates is an agreement between the transferor and the transferee. The respondent

has not even alleged much less proved, any agreement between the transferor and him that the right of recovery of the arrears of rent prior to the sale was assigned or transferred to him. The sale deed was not produced. No other document executed between the transferor and the respondent was produced to show that the transferor had assigned the right of recovery of arrears of rent to the transferee. A mere intimation by the transferor contained in Exhibit 32 addressed to the lessee to pay the rent to the transferee cannot by itself amount to an agreement between the transferor and the transferee assigning the right to recover the arrears of rent. For these reasons, the decree for possession passed on the ground of default by the trial Court and confirmed by the appellate Court is erroneous in law and needs to be set aside.

6. The trial Court as well as the appellate Court have held that the petitioner requires the suit premises reasonably and bonafide for his own use and occupation. The petitioner is in possession of two rooms on the first floor of the suit premises and also in possession of one room on the ground floor. There are six members of family in the family of the petitioner. On these facts, the finding that the respondent required the suit premises reasonably and

bonafide is a possible finding. The trial Court however, held that the two sons of the original tenant were rikshaw drivers. They appeared to be driving rickshaw belonging to others and there was no evidence that they were rickshaw owners. They are only rickshaw drivers and having no other source of income, as against that the respondent is a man of means - a goldsmith. Taking into consideration the financial position of the petitioners and the respondent, the trial Court held that greater hardship would be caused to the petitioner by passing a decree than to the respondent by refusing to pass a decree. In para 12 of its judgment, the appellate Court has observed that greater hardship would be caused to the petitioner by passing a decree than to the respondent by refusing to pass a decree. In the circumstances, though the respondent had proved the need, he was not entitled to a decree of possession.

7. For these reasons, the petition succeeds. Rule is made absolute in terms of prayer clause (b). The respondent shall pay costs of the petitioners throughout.

D.G.KARNIK, J